

No. 15,678

In the
United States Court of Appeals
For the Ninth Circuit

1957 TERM

KINGMAN WATER COMPANY,
a corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appellant's Reply Brief

Appeal from the United States District Court
for the District of Arizona

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SUBJECT INDEX

	Page
Replying to : Appellee's Statement of the Case.....	1
Replying to : Appellee's Argument	
Issue No. 1.....	3
Issue No. 2.....	7
Issue No. 3.....	9
General Conclusion	12

TABLE OF AUTHORITIES CITED OR DISCUSSED

CASES	Pages
Brooklyn and Richmond Ferry Co. v. United States, 167 Fed. 2nd 330	10, 11
Brubaker and Bros. v. Millersburg Water Company (Pennsylvania Public Service Commission), P.U.R. 1929 A 808....	8
City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210.....	6
City of Phoenix v. State ex. rel. Conway, 53 Ariz. 28, 85 P.2d 56	6
City of Tucson v. Sims, 39 Ariz. 168, 4 P.2d 673.....	6
Crandall v. Town of Safford, 47 Ariz. 402, 56 P.2d 660.....	6
Florida Power and Light Co. v. State of Florida, ex. rel. Malcolm, 107 Fla. 317, 144 So. 657.....	5, 8
Gardner v. Industrial Commission, 72 Ariz. 274, 233 P.2d 833	6
Lewis v. Potomac Electric Power Co. (C.A. Dist. Col.), 64 F. 2d 701	5, 8
Moebs v. Potomac Electric Power Co. (C.A. Dist. Col.), 64 Fed. 703	8
Noble v. City of Troy (Montana Public Service Commission), P.U.R. 1932 C, 256.....	9
Sixty-seven South Munn, Inc. v. Board of Public Utility Commissioners, 107 N.J.L. 45, 147 Atl. 735; affirmed, per curiam, 107 N.J.L. 386, 152 Atl. 920; certiorari denied, 283 U.S. 828, 75 L.Ed. 1441, 51 S.Ct. 352.....	5, 8
Sumid v. City of Prescott, 27 Ariz. 111, 230 P. 1103.....	6
United States v. Oklahoma Gas and Electric Co., 297 Fed. 575	4
United States v. Skinner & E. Corp. (D.C. Wash.), 28 F.2d 373; affirmed in part (C.A. 9th), 35 Fed. 2nd 889; appeal dismissed, 281 U.S. 770, 74 L.Ed. 1176, 50 S.Ct. 248.....	12
United States v. Wurts, 303 U.S. 414.....	10, 11
Wisconsin Central Railroad v. United States, 164 U.S. 190.....	10, 11

TABLE OF AUTHORITIES CITED OR DISCUSSED

iii

ARIZONA STATUTES	Page
Sec. 40-374, Arizona Revised Statutes.....	3
SECONDARY AUTHORITIES	
40 Am. Jur., Payments, Sec. 209, Page 859.....	11

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Replying to: Appellee's Statement of the Case

Appellee's Statement of the Case is, for the most part, an accurate presentation of the matters set forth in the transcript of record and, in most particulars, conforms agreeably with the Statement of the Case made in appellant's opening brief.

However, appellee's Statement of the Case makes what we believe to be an unwarranted assumption which is not supported by the record and which cannot pass unheeded. We speak in this regard of the agreement for water service between appellant, Kingman Water Company, and appellee, United States of America. Appellee's Statement of Fact contains the following statement:

“The only agreement in effect during the years in question was an *implied* agreement based on the fact that water was furnished by the appellant and accepted by the appellee. * * * *the trial court found that the only contract in existence was the implied contract* * * *” (Emphasis supplied.) (Appellee’s Brief, Pages 2-3)

We respectfully submit that the above statement represents nothing more than appellee’s conclusion inasmuch as the above was not at all found by the trial court as is witnessed by the findings of the trial court, to wit: Finding of Fact No. 5 (T.R. 14) to the effect that “plaintiff entered into a contract with defendant”, said finding not containing any direct statement as to whether said contract was express or implied; and Conclusion of Law No. 3 (T.R. 15) to the effect that “any agreement between plaintiff and defendant for water services at a rate different from that filed by the defendant with the Arizona Corporation Commission would be void.” These are the only findings made by the trial court with reference to any contract or agreement between the parties, and, as the findings witness, the Court did *not* find an implied contract, for certainly, if the trial court had intended to find a contract by nothing more than mere implication, it would have so stated and would not have used the words “entered into”, which universally imply express negotiations of some kind; moreover, on the other hand, the trial court concluded that a contract at a “different rate” would be void, *which finding could relate only to the oral contract of which there was considerable and uncontradicted evidence.*

We therefore respectfully submit that the conclusion of appellee that the only agreement in effect herein was an implied contract is contrary to the findings of the trial court and to the evidence set out in the transcript of record.

Replying to: Appellee's Argument—Issue No. 1

Most of the discussion made by appellee under this division wholly begs the question presented by appellant's opening brief. We believe that these matters should be pointed out.

At Page 4 of its brief, appellee states that the subject housing project was located within the area served by appellant and that appellant was therefore obligated to serve all who applied, and that the government applied for water service and that such service was furnished. In the first instance, appellee is in error in its statement that appellant was "obligated to serve all who applied" to it for service. As pointed out in appellant's opening brief, a public utility is obliged to serve *only when the service sought is that type of service which a public utility is under a duty to supply* and is under no obligation whatever outside of that duty. Appellee completely avoids this issue and relies simply upon the fact that service was furnished, irrespective of whether such service was furnished as a public or private activity.

Appellee next refers, at Page 4 of its brief, to the Arizona Statute, A.R.S. 40-374, and makes the statement that said statute "prohibits any change" other than as set forth in the schedule on file. As pointed out in appellant's opening brief, the statute referred to makes no such provision but simply prohibits any change *in the amount of compensation*. Moreover, if, as appellant's brief points out, the services rendered were in the nature of a private activity, then this statute could have no application whatever.

Appellee next discusses, at Page 4 of its brief, the procedure to be followed in Arizona for changing a filed rate and states that "if an oral agreement was entered into between the parties hereto for the purpose of establishing a

different rate * * *, appellant should have proceeded under the statute." As the record shows, the purpose of the oral agreement was not designed to establish a different rate but to adhere strictly to the rate on file. This fact is supported, employing the very argument used by appellee, by the fact that no application for change of rate was made, indicating that no change of rate was intended. Obviously, the only "change" was one in the method of delivery, and not in the amount of compensation.

At Page 5 of its brief, appellee cites several authorities to the effect that the fact that a governmental agency was the consumer hereunder does not render the Arizona regulatory statutes inapplicable. We fail to see what bearing these authorities have upon the issue under discussion inasmuch as no argument has been made in appellant's opening brief that the regulatory statutes were inapplicable because the United States was appellant's customer. On the contrary, it is appellant's position that the rules of law set forth under Issue No. 1 of appellant's opening brief are applicable to customers of a public utility regardless of their governmental or private capacity; appellant was either under a duty to sell to appellee through master meters or it was not under such a duty, regardless of appellee's sovereign status.

Likewise, at Page 5 of its brief, the citation by appellee of authority to the effect that rates prescribed by a contract entered into *prior* to the enactment of a statute creating a public service commission is wholly inapplicable to this case inasmuch as all parties concede that the Arizona Corporation Commission existed long before any dealings took place between appellant and appellee.

We also take issue with appellee's statement that the case of *U.S. v. Oklahoma Gas & Electric Co.*, 297 Fed. 575, presents a situation identical to the present case. As a reading of that case will disclose, the facts therein concerned a

contract and a change of rate by the state regulatory body, differing from the rate contracted for. There is, therefore, a very considerable factual distinction between the two cases. From a strictly legal point of view, we do not question the authority of the case in so far as it bears upon the *public* activities of a public utility. However, in the instant case, it is clear that appellant was acting in a private capacity and such authority is therefore wholly inapplicable to the facts of this case.

It is difficult to reconcile appellee's statement, at Page 6 of its brief, that there is "no evidence" to support the fact that the United States requested delivery of water through master meters on given terms and that appellant refused such service upon the terms requested. As pointed out by appellant's opening brief, and as appellee admits, a written contract incorporating such terms was tendered to appellant by the United States and the same was flatly rejected. It would seem that no better evidence could be desired.

Appellee next attempts, at Page 7 of its brief, to distinguish the cases of *Sixty-seven South Munn, Inc. v. Board of Public Utility Commissioners*, 107 N.J.L. 45, 147 Atl. 735; affirmed, per curiam, 107 N.J.L. 386, 152 Atl. 920; certiorari denied, 283 U.S. 828, 75 L.Ed. 1441, 51 S.Ct. 352, *Lewis v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 F.2d 701, and *Florida Power and Light Co. v. State of Florida, ex. rel. Malcolm*, 107 Fla. 317, 144 So. 657 by pointing out that said cases deal with fact situations wherein the property owner intended to resell the commodity to his tenants. If there had been no such arrangement contemplated in this case, appellee's attempt to distinguish the above cases might be well taken. However, the contract tendered by the United States specifically provided that the government might sell the water sold to it to its tenants.

It therefore appears that the authorities cited are strictly in conformance with the intent of the United States as stated in the contract, which contract was prepared by the government itself.

In view of the terms of the tendered contract, it appears strange that appellee then makes the further argument, at Pages 7 and 8 of its brief, that it was "not the intent" of the government to sell the water. Appellee apparently arrives at this conclusion upon a consideration of what was actually *done* rather than what the government would have had a right to do had the contract been entered into. We respectfully submit that what was actually done can have no bearing whatever upon the rights which the government would have had under the contract, which contract specifically provided that the United States could sell the water to its tenants.

Regarding the rule of *City of Phoenix v. Kasun*, 54 Ariz. 470, 97 P.2d 210, appellee's brief makes the suggestion, at Pages 8 and 9 of its brief, that the rule of the *Kasun* case should not apply to utilities other than municipal utilities. There is nothing whatever in the *Kasun* decision to support such a proposition and, on the other hand, there is abundant authority in Arizona to the effect that every municipal utility is governed by the same rules of law which apply to any private corporation. *Gardner v. Industrial Commission*, 72 Ariz. 274, 233 P.2d 833; *Sumid v. City of Prescott*, 27 Ariz. 111, 230 P. 1103; *City of Tucson v. Sims*, 39 Ariz. 168, 4 P.2d 673; *City of Phoenix v. State ex rel. Conway*, 53 Ariz. 28, 85 P.2d 56; *Crandall v. Town of Safford*, 47 Ariz. 402, 56 P.2d 660.

In conclusion, appellee's brief contains no citation of authority under Issue No. 1 to support the premise that appellant, in the performance of its agreement with appellee,

was acting as a *public utility*. Unless such a proposition can be sustained, there can be no reason for applying the regulatory statutes involved herein and, if such regulatory statutes do not apply, then, this cause must be reversed.

Replying to: Appellee's Argument—Issue No. 2

Under this division, appellee's argument states that the ambiguity of the 1919 water rate cannot be affected by the circumstances existing in 1944. This statement is obviously the result of appellee's failure to distinguish between ambiguity as to *compensation* on the one hand and ambiguity as to *method of delivery* on the other hand. As examination of the 1919 water rate will disclose, there was no ambiguity as to the amount of compensation to which appellant was entitled. The only question, therefore, was whether under the 1944 contract and the wartime conditions existing in 1944, the 1919 rate required an actual physical meter; i.e., was an actual physical meter required for each housing unit in order to secure the right to the "minimum charge" referred to in the rate; stated in another way: Did the delivery *have* to be through a meter to warrant a minimum charge? It is here at this point, in construing the 1944 contract, and in reconciling its terms with the 1919 rate, that the surrounding circumstances in 1944 necessarily had to be considered. The evidence is clear that, except for the circumstances existing in 1944, individual meters would have been installed. Had that been done, there could be no question as to appellant's right to receive the monies which have been paid to it. The question, therefore, is solely whether the 1944 circumstances would warrant the method of delivery employed in the 1944 contract. We respectfully say that those circumstances did so warrant them, by an

agreement to bill the United States strictly at the tariff rate, "as if" actual meters had been installed. This was a matter which *did not affect the amount of compensation, but only the method of delivery*, and therefore did not require a modification in appellant's tariff, for in either case, the *amount paid would be the same*.

Appellee next attempts to distinguish the case of *Brubaker and Bros. v. Millersburg Water Company*, P.U.R. 1929 A, 808, upon the ground that the utility had a written rule requiring a separately controlled service line. It is obvious that such a rule would merely be identical to a rule by which a utility could refuse to sell through a master meter, the same constituting an identical statement phrased in a different way. Considered in this light, there is no requirement that the tariff of a utility contain such a rule in writing, inasmuch as *such rule may exist only in the "practice" of the utility*; see for example: *Sixty-seven South Munn, Inc. v. Board of Public Utility Commissioners*, 107 N.J.L. 45, 147 Atl. 735; affirmed, per curiam, 107 N.J.L. 386, 152 Atl. 920; certiorari denied, 283 U.S. 828, 75 L.Ed. 1441, 51 S.Ct. 352; *Lewis v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 F.2d 701; *Moebs v. Potomac Electric Power Co.* (C.A. Dist. Col.), 64 Fed. 703 and *Florida Power and Light Co. v. State of Florida*, ex rel. Malcolm, 107 Fla. 317, 144 So. 657. It thus appears that the rule of the *Brubaker* case applies fully notwithstanding that the tariff contains no such writing requiring a separately controlled service line, inasmuch as the right of a public utility to follow such a practice is recognized merely as a matter of logic, if that is its practice, and that such was the practice of appellant is sustained by the record. We note that, with the exception of the above attempt to distinguish the *Brubaker* case, appellee offers no grounds upon which the *Brubaker* case should not be applicable.

Further, regarding the case of *Noble v. City of Troy*, P.U.R. 1932 C, 256, appellee points out that in that case no meter was employed whatever, and still the utility was entitled to charge a service charge to each separate user. The case demonstrates again that service charges are governed by the number of consumers and not by the number of meters employed. If appellee's argument herein were to be followed to its conclusion, it would be seen that the law which appellee advances would have denied any compensation whatever to the utility in the *Noble* case merely because there was no meter employed. Such conclusion demonstrates the error inherent in appellee's reasoning.

In conclusion, appellee once again seeks to belittle the tremendous impact of the wartime circumstances under which service was rendered to it, and, on the contrary, seeks to employ such circumstances in preventing appellant from retaining what it otherwise would clearly have been entitled to receive. While this proceeding is not equitable in nature, we believe that there is a point beyond which the law will not tolerate the turning of circumstances to unfair advantage. We also note that appellee cites no authority whatever to sustain its proposition that the number of service charges chargeable is governed solely by the number of meters in use, which is the proposition upon which appellee's whole case turns.

Replying to: Appellee's Argument—Issue No. 3

Under this division appellee relies solely upon a purported rule of law that the general rule of law that a person cannot recover money paid under mistake of law does not apply when the United States is the party making the payment. Three cases are cited in support of the purported

rule exempting the United States from the universally accepted rule precluding recovery of payment, said cases being *Brooklyn and Richmond Ferry Co. v. United States*, 167 Fed. 2nd 330; *United States v. Wurts*, 303 U.S. 414, and *Wisconsin Central Railroad v. United States*, 164 U.S. 190. Each of these cases are clearly distinguishable from the present case, and moreover it will be seen that these cases, when considered from earliest pronouncement to latest pronouncement, constitute "pulling oneself up by one's boot straps", resulting in the purported creation of a rule of law with no common law to support it.

The case principally relied upon by appellee is the case of *Brooklyn and Richmond Ferry Co. v. United States, supra*. This case purports to lay down the rule that "the rule barring recovery of payments under mistake of law" as it bears upon payments made by the United States, is subject to a "well known exception". It thus appears that the *Brooklyn and Richmond* case purports to state an established rule of law, and to that end the opinion in the *Brooklyn and Richmond* case cites cases which purport to support the rule stated therein. Upon examination however, it will be seen that the rule as cited in the *Brooklyn and Richmond* case is not at all supported by the cases cited as supporting it, as follows, to wit: *Wisconsin Central Railroad v. United States* (being another of the cases cited by appellee, *supra*) is readily distinguishable from the case at bar upon the ground that in that case the Post Office Department had paid a carrier more than its contract rate for carriage of mail, and a United States statute (R.S. Sec. 4057) specifically directed the Post Master General to sue to recover such overpayment. As such, the *Wisconsin Central Railroad* case specifically went off upon a particular United States statute; there is no similar statute in this case. The two cases are therefore readily distinguishable and we

respectfully submit that in no case does a rule of law derived from a statute create an identical rule as common law. In short, the *Wisconsin Central Railway* case is no authority whatever for the rule of the *Brooklyn and Richmond* case or for the proposition upon which appellee relies herein.

The next case cited in the *Brooklyn and Richmond* case is the case of *United States v. Wurts* (also cited by appellee, *supra*). The rule of law declared in that case is that monies which are *wrongfully* paid may be recovered. This may be quite true, but is no authority whatever for the rule of the *Brooklyn and Richmond* case that payments made under mistake may be recovered. As pointed out in 40 Am. Jur., Payments, Sec. 209, Page 859, there is a clear distinction between what is merely a mistake and what actually is in violation of some positive rule of law. As stated in the text cited above:

“A distinction has been drawn between a payment made in direct violation of law and a payment made under a mistake of law, it being held that where an officer makes a payment and the account is within his general jurisdiction but the payment is made under a mistake of law, there can be no recovery, but where the payment is made in direct violation of law there may be recovery”.

The *Wurts* case is therefore clearly distinguishable upon the grounds that in the instant case there was nothing either wrongful or illegal about the payments made to appellant, the only question being whether there had been a mistake as to the basis of computation of the amounts so paid.

It thus appears that the “well known exception” referred to in the *Brooklyn and Richmond* case is one without substance and contrary to its own cited authority. We respectfully submit that there is and should be no rule of law

exempting the United States from the operation of substantive rules of law of a sovereign state bearing upon voluntary payments, and that the rules heretofore advanced by appellant are wholly applicable.

We also note that appellee makes no attempt whatever to discuss or to distinguish the rule laid down by the Ninth Circuit in *United States v. Skinner and E. Corporation*, 35 Fed. 2nd 889, wherein this Court adopted the rule upon which appellant relies herein.

Appellee concludes its discussion under this division with citation of authority bearing upon estoppel. We concede that this proposition was argued at the trial level, but the question of estoppel has not been presented in appellant's opening brief and we fail to see how the question of estoppel is properly raised upon this appeal. It need only be noted that estoppel is equitable in nature and exists separate and distinct from the rules of common law advanced by appellant as bearing upon recovery of voluntary payments.

General Conclusion

In conclusion, we respectfully submit that the authorities cited in appellee's brief do not constitute justification for the rulings of the trial court appealed from herein, and that this cause should be reversed with instruction to enter judgment for the defendant, Kingman Water Company, upon the grounds and for the reasons set forth in appellant's opening brief.

Respectfully submitted,

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